The Opinion of Advocate General Bot in Taricco II: Seven "Deadly" Sins and a Modest Proposal

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A new chapter in the *Taricco* saga has been written on July 18th, when Advocate General Yves Bot released his opinion on the preliminary reference from the Italian Constitutional Court ('ICC').

Where were we?

In our last entry on this blog we commented on the order no. 24/2017 by which the ICC has asked the Court of Justice of the European Union ('ECJ') a preliminary ruling on the interpretation of the judgment of September 8th (C-105/14).

In the aforementioned decision, the ECJ found that the Italian criminal law provisions establishing narrow limitation periods were liable to have an adverse effect on the fulfilment of the Member States' obligations under Article 325 TFEU to protect the financial interests of the European Union by adopting effective and dissuasive penalties. Accordingly, the ECJ ruled that domestic courts are required to disapply the said provisions when prosecution of serious VAT frauds is time-barred in a significant number of cases.

According to the ECJ no violation of the principle of legality, enshrined in Article 49 of the Charter, would occur in such scenario. However, the ICC – that had been asked to apply the counter-limits doctrine in order to contrast the enforcement of this judgment – found that the decision was incompatible with the respect of the overriding supreme principles of the Constitution. Most notably, the decision of the ECJ was seen in contrast with the national understanding of the principle of legality.

Significant expectations were therefore placed on the Advocate General, whose opinion may turn out to be very influential on the *Taricco II* decision to be adopted by the ECJ. However, Advocate General Bot confirmed, and even went beyond, the arguments of the ECJ in *Taricco*, through an opinion that, if followed by the Court of Justice, will definitely disappoint the ICC and force the same to resort on the counter-limits doctrine.

However, this outcome turns out to be all but surprising if one considers that Bot served as Advocate General also in the *Melloni* case, where the ECJ validated his inflexible approach aimed at defending the unity, primacy and effectiveness of EU law from any claim to apply higher standard of protection by Member States.

The option to allocate to the same Advocate General similar cases proved successful in *P v. S.* (C-13/94) and *Grant* (C-249/96) where the ECJ developed a very innovative approach on the application of the principle of equal treatment with regard to discrimination on ground of sex concerning transsexuals and homosexuals prompted by the influential opinion of Professor Tesauro.

However, this does not seem to have been a good idea in *Taricco*, where the most feared argument by the ICC related specifically to the *Melloni* judgment. While the ICC is seeking cooperation and 'a step back' from the ECJ, in fact, the opinion of the Advocate General reflects probably the most conservative and radical view on the supremacy of the EU legal order.

As a consequence, the opinion is not reducing at all the distance between Rome and Luxembourg and is likely to make them even more harsh the next steps of the saga and even more limited the room for an actual cooperation.

How to escape from the deadly embrace of Bot, that, if possible, took even a more radical approach than the ECJ?

It is worth considering some critical points that emerge prima facie from the opinion of the Advocate General. Bot turns the clock back to *Gauweiler*, and by literally pointing out that 'in that regard, the order for reference reminds me of the question for a preliminary ruling submitted by the Bundesverfassungsgericht' (para. 10) is de facto disregarding an important assist offered by the ICC that in its order has framed the request for preliminary ruling more on the grounds of the difference between Member States constitutional traditions than on the notion of constitutional identity.

1. No regard seems to be paid to the acknowledgment by the ICC of the primacy of EU law. Actually, the ICC did not only define the recognition of the primacy of EU law 'an established fact within the case law of this Court pursuant to Article 11 of the Constitution'; but also specified that 'The primacy of EU law does not express a mere technical configuration of the system of national and supranational sources of law. It rather reflects the conviction that the objective of unity, within the context of a legal order that ensures peace and justice between nations, justifies the renunciation of areas of sovereignty, even if defined through constitutional law'. By adopting this view, the ICC has outlined a new perspective to look at the interaction between the national and the European systems: an integrated legal order governed by the primacy, and no longer two separate but coordinate legal orders. Yet, the opinion of Advocate General Bot seems to miss the point, while sticking to the allegedly catastrophic consequences that the primacy would derive from the acceptance of a broader understanding of the principle of legality as a general principle of EU law. Again, like in his opinion in *Melloni*, Bot seems to get confused on the difference between primacy and uniformity.

2. Again, Bot fails to take an interesting 'assist' from the ICC to revisit *Taricco I* smoothly. In particular, the order of the ICC (p. 7) expressly mentioned para. 53 of the judgment handed down on 8th September 2015, where the ECJ itself held that 'if the national court decides to disapply the national provisions at issue, it must also ensure that the fundamental rights of the persons concerned are respected'. Indeed, by this reference the ECJ seems to carve out a 'fundamental rights exception' to the respect of the obligations derived, through a controversial interpretation, from Article 325 TFEU. It should not be forgotten that *Taricco I* requires essentially to restrict the protection afforded to the principle of legality by the Italian Constitution on the basis of the obligations to protect the financial interests of the Union. So, para. 53 could be a crucial point to prevent a constitutional clash without venturing into the realm of the primacy of EU law.

3. One of the main weaknesses of the judgment of ECJ was the lack of a comprehensive scrutiny on its impact on the principle of legality. The ECJ was satisfied with declaring that, although the rules on limitation periods are treated as a matter of substantive criminal law in Italy, requiring domestic courts to disapply these provisions does not violate Article 49 of the Charter. This position reflects a consideration of the statute of limitation as a purely procedural matter that does not fall within the scope of the principle of legality. However, the consequences of *Taricco I* go far beyond the mere dichotomy between substantive and procedural criminal law. As the ICC had pointed out: 'Even in the event that it were concluded that limitation is procedural in nature, or that it may in any case be regulated also by legislation enacted after the offence was committed, this would not affect the principle that the activity of the courts that are called upon to apply it must be governed by legal provisions that are sufficiently precise. This principle encapsulates a defining feature of the constitutional systems of the Member States of civil law tradition. These do not grant the courts the power to create new criminal law in place of that established by legislation approved by Parliament, and in any case reject the notion that the criminal courts may be charged with fulfilling a purpose, albeit defined by law, if the law does not specify in what manner and within what limits this may occur'. Furthermore, the ICC stressed that 'this conclusion would exceed the limits applicable to the exercise of judicial powers within a state governed by the rule of law'. Notwithstanding these efforts, the opinion of Advocate General Bot still keeps its focus on the difference between the domestic and European understanding of the principle of legality and its scope, without taking into account other profiles that even more seriously are likely to generate a clash between the constitutional order and the European one. While the opinion contains extensive references to the case law of the European Court of Human Rights to support the view of the ECJ on the qualification of limitation periods, the other arguments raised by the ICC are marginalized. It is worth bearing in mind that one of the reasons why the ICC decided to resort on the preliminary reference instead of enforcing the counter-limits doctrine is

probably to highlight the existence of a range of constitutional law profiles other than the mere understanding of the limitation periods.

4. In connection to the point above, paras. 75-76 of the opinion of Bot read as follows: '75. It is traditionally accepted that, in accordance with that principle, no one can be accused of having committed an offence and no penalty can be imposed unless both offence and penalty were provided for and defined by the law before the acts took place. 76. In the context of the present case, that principle is problematic only because the Italian legislation adds [emphasis added] to that definition by Beccaria that the limitation rules form part of that principle and that the offender therefore has a vested right that the entire proceedings should take place according to the limitation rules as they existed on the day on which he committed the offence'. Eventually, Bot concludes: 'it seems to me that the individuals concerned could not fail to be aware that the acts which they are now accused of having committed were likely to render them criminally liable and, in the event of a final conviction, to result in the application of the penalty determined by law. Those acts were offences at the time when they were committed and the penalties will not be any heavier than those applicable at the material time. I do not think that, because that obligation is fulfilled by the national court, the persons concerned will sustain greater harm than that to which they were exposed at the time when the offence was committed [emphasis added]'. One could definitely question whether the matter of statute of limitations, as such, defines the constitutional identity of Italy. However, as noted by Massimo Luciani, the ICC regards limitation rules as substantive criminal law and thus subject the same to the principle of legality, that without any doubt amounts to a part of the constitutional identity. Then, the right perspective is probably the opposite one than Bot's.

5. The opinion is not convincing even when Bot, while accepting that the criteria to be applied by Italian courts to disapply the limitation rules are vague and generic, argues that the same are based on the existence of a systematic risk of impunity. Then, since the assessment of such nature may be difficult, Bot proposes that the disapplication 'is based solely on the nature of the offence and that the definition of that nature is a matter for the EU legislature'. There is a clear shift from the realm of interpretation to the domain of law-making that nevertheless does not resolve the problem at hand in the pending cases.

6. As pointed out above, while literally comparing the reference from the ICC to the stance of the Bundesverfassungsgericht in the *Gauweiler* case, the Advocate General does not seize the opportunity to emancipate *Taricco* from the debate on the constitutional identity as the ICC was apparently trying to do. This way, the opinion is probably setting aside the option to enrich the content of Article 49 of the Charter through reference to (different) constitutional traditions and rank the principle of legality, according to a broader understanding, among the general principles of EU law.

7. Last, but not least, probably the most depressing point of the opinion, focusing on an allegedly constitutional identity-based exception. Indeed, as we noted, the language of the order of the ICC has been pretty vague with respect to the possible enforcement of Article 4(2) TEU, while more focused on the language of constitutional tradition(s) than that of the constitutional identity. However, the opinion of Bot does not limit itself to reject the use of the constitutional identity as a ground not to enforce the *Taricco I* decision. As we will say in a bit, Article 4(2) TEU is perhaps a wrong argument to contrast the application of *Taricco I*. Yet, Bot speculates on the conditions under which a possible constitutional identity exception could be enforced. First, he maintains that the immediate application of a longer limitation period would not affect the national identity; in this respect, as pointed out under p. 5, it is worth stressing that some commentators argue that limitation rules do not per se define the constitutional identity, but in the Italian legal order they are nevertheless subject to the principle of legality, that is definitely part of such identity. Moreover, Bot claims that the ICC has failed to substantiate why the principle of legality falls within the overriding principles of the constitutional order. He also maintains, according to a very formalistic and ultimately wrong view, that the only principles ranked as 'fundamental' are those set out in Article 1 to 12 of the Italian Constitution. By taking this view, the opinion disregards the content of the case law of the ICC and the same notion of counter-limits, that are not limited to the principles to which the Constitution formally attached the label of 'fundamental' ones. So, even though the Advocate General may be right while arguing that it would be improper to apply Article 4(2) TEU in

the case, the reasoning supporting this conclusion is far from being acceptable. Indeed, it should be up to national courts to assess whether EU law infringes the constitutional identity of the Member State but the opinion of Bot is de facto reversing this common ground. Moreover, Bot seems to draw a distinction between what should be part of the national constitutional identity and what should not. But this assessment is obviously reserved to the ICC. In any cases, as we will clarify later, the arguments made by Bot in this respect seems to disregard the very nature and the goals of the Article 4(2) TEU clause.

Now, let's go back to our question: how to escape this deadly embrace?

Against this background we do feel that relying on the constitutional identity, and thus on Article 4(2) TEU, would be a troublesome and ultimately wrong path. Apparently, the wind of populism is blowing across Europe and courts (including constitutional and supreme courts) are not immune therefrom. Within this context, the enforcement of the constitutional identity clause to contrast the application and, sometimes, the primacy of EU law would be a powder keg waiting to be lit. And the effects of an even apparently and isolated judgment enforcing this clause could extend to a potentially high number of states, particularly those in Eastern Europe where the respect of the rule of law is continuously under threat.

The use of the constitutional identity clause, then, should be revisited, in primis among those scholars who have overweighed the respect of the national identity as a 'problem-solver', i.e. a means to reconcile the differences between Member States and the Union as far as a different degree of protection of fundamental rights is concerned. Indeed, as noted recently by L.S. Rossi, the ECJ has never identified the constitutional identity clause enshrined in Article 4(2) TEU as the privileged arena to deal the multilevel protection fundamental rights in its case law on the application of. The reasons why the constitutional identity clause was introduced, in fact, relate to the safeguarding of the fundamental political and constitutional structures. As noted by Barbara Guastaferro, the assumption that the purpose of the clause is that of applying in exceptional cases of conflicts between EU law and domestic constitutional law — in an attempt to narrow the scope of application of the supremacy doctrine — has to be challenged; while the potential for a use of the clause in governing the ordinary functioning of EU law should be, on the contrary, highlighted. Moreover, as the Hungarian case is showing very well, the language of constitutional identity is very easy to be manipulated by non-independent constitutional courts.Then, the ECJ should not take the slippery slope suggested by Bot and consequently disregard any Article 4(2) TUE-based argument.

However, even setting aside the use of the constitutional identity clause, the ECJ cannot neglect the existence of several profiles where a constitutional clash is likely to occur in the field of fundamental rights. Hence, if it is not technically possible to resort on the constitutional identity clause, this does not imply that the ECJ is deprived of any chances to safeguard the fundamental rights and avoid a harsh reaction of the ICC.

As suggested by L. Rossi, then, a possible scenario is that the ECJ takes fundamental rights seriously (as the same had requested domestic courts to do at para. 53 of *Taricco I*) and revisits the obligations deriving for the Member State from Article 325 TFEU accordingly.

Article 6(3) in this respect could be, as proposed also by Roberto Mastroianni, the sound reference to apply as a possible limit to the enforcement of *Taricco I* based on the constitutional traditions of Member States. This provision ranks fundamental rights, as they result from the constitutional traditions common to Member States, among the general principles of EU law. Unlike the constitutional identity, then, the constitutional traditions are meant to include fundamental rights.

The option to rely on Article 6(3) for a partial revirement of the ECJ through enriching the content of the principle of legality would be consistent with the approach of the ICC that stressed the importance of a pluralistic view of the constitutional traditions instead of seeking an explicit and spirited defense of the constitutional identity. It is true that Article 6(3) refers to the constitutional traditions that are common (emphasis added) to the Member States; however, the reference to this characteristic should not prevent to inject a certain degree of pluralism in the notion of constitutional tradition(s), as the ICC has suggested, that makes it possible to reconcile a higher standard of

protection entrenched in the national Constitution and the primacy of EU law.

Finally, since the same ECJ ruled at para. 53 that domestic courts are required to ensure that fundamental rights are respected when Member States fulfill the obligations deriving from EU law, the *Melloni*-driven interpretation of Article 53 of the Charter can be overcome as well: in this scenario, in fact, the general principles, and the related common constitutional traditions would end up encapsulating the higher standard of protection of fundamental rights, without calling into question the primacy, unity and effectiveness of EU law.

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